AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–132 OF 1995

SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA

26 MARCH 1997

Arbitration *— Award — Setting aside — Application — Whether court may interfere with award of arbitrator — Whether error of law appeared on the face of the award — Whether there was any merit in applicant's arguments — Arbitration Act 1952 s 24(2)*

The respondent ('Ng') was engaged to provide architectural services for the renovation of a factory belonging to the appellant ('Ho'). Ng initiated arbitration procedure to recover his fees. The arbitrator delivered his award in favour of Ng. Ho's application to set aside the arbitration award was dismissed by the High Court. Ho appealed. It was contended that: (i) the arbitrator had misconducted himself because he had failed to deal with all the issues raised by Ho; (ii) Ng had unilaterally and unlawfully terminated the contract by giving notice. It was argued that the arbitrator imported his own knowledge into the case by holding that it was the custom and practice to give 60 days notice or such lesser period as may be agreed between the parties; and (iii) this was a lump sum contract and the arbitrator had imported his own knowledge by deciding that it was a periodical payment contract.

Held, dismissing the appeal:

The court's approach in cases like this is well established. An arbitrator's award may be set aside for error of law appearing on the face of it. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award some legal proposition which is the basis of the award and which is erroneous. The court must not be over-ready to set aside awards unless there has been something radically wrong in the proceeding.

In the present case, the court was unable to see anything radically wrong with the award. There was also no merit in the appellant's arguments. It was conceded in the court below that all issues raised in the pleadings had been considered by the arbitrator. There was no error on the face of the record here. The Architects (Amendment) Rules 1986 — which states that the agreement between the architect and the client may be terminated at any time by either party giving to the other party notice — was in force at all material times. Further, Ng's letter of termination was replied by Ho stating that the repudiation was accepted. Thus, the contract was at an end. With regard to the mode of payment, Ng's terms which Ho accepted showed that periodical payments were part and parcel of the contract. In the result, the court could find no grounds whatsoever for interfering with the award of the arbitrator. So far as the law was concerned,

there was no merit in the appeal (see pp 395G–I, 396B, F–H, 397C–F and 398C, E–F). A

[Bahasa Malaysia summary

Penentang ('Ng') digaji untuk menyediakan perkhidmatan architectural untuk pengubahsuaian sebuah kilang kepunyaan perayu ('Ho'). Ng telah memulakan prosedur timbangtara untuk mendapat balik yurannya. Penimbangtara telah menyampaikan awardnya memihak kepada Ng. Permohonan Ho untuk mengetepikan award timbangtara telah ditolak oleh Mahkamah Tinggi. Ho merayu. Ia dihujahkan bahawa: (i) penimbangtara telah salah laku dirinya kerana dia telah gagal menguruskan kesemua isu yang dibangkitkan oleh Ho; (ii) Ng telah menamatkan kontrak secara satu pihak dan tidak sah dengan memberikan notis. Ia dihujahkan bahawa penimbangtara telah mengimport pengetahuan sendiri ke dalam kes dengan memutuskan bahawa ia merupakan adat dan amalan untuk memberikan notis 60 hari atau tempoh yang lebih singkat sebagaimana yang mungkin disetujui di antara pihak-pihak; dan (iii) ini merupakan kontrak bayaran sekaligus dan penimbangtara telah mengimport pengetahuan sendiri dengan memutuskan bahawa ia berupa kontrak bayaran berkala. B C D

Diputuskan, menolak rayuan: E

Pendekatan mahkamah dalam kes seperti yang di sini adalah mantap. Award seseorang timbangtara boleh diketepikan akibat kesilapan undang-undang yang menonjol pada zahirnya. Bagi menjadi satu alasan untuk mengetepikan award, kesilapan undang-undang pada zahir award mestilah sedemikian di mana terdapat sebahagian kenyataan undang-undang dalam award yang merupakan dasar award dan yang mana adalah salah. Mahkamah mestilah tidak terlalu bersedia untuk mengetepikan award melainkan terdapat sesuatu yang secara radikal tidak kena dalam prosiding. F

Dalam kes ini, mahkamah tidak dapat melihat apa-apa yang secara radikal tidak kena pada award. Tiada juga merit dalam penghujahan perayu. Ia diakui di mahkamah bawah bahawa segala isu yang dibangkitkan dalam pliding telah dipertimbangkan oleh penimbangtara. Tiada kesilapan pada zahir rekod di sini. Kaedah-Kaedah (Pindaan) Arkitek 1986 — yang menyatakan perjanjian di antara arkitek dan klien boleh ditamatkan pada bila-bila masa oleh mana-mana pihak dengan memberi notis kepada pihak yang satu lagi — berkuatkuasa pada semua masa yang material. Seterusnya, surat penamatan Ng dibalas oleh Ho menyatakan bahawa penolakan telah diterima. Justeru itu, kontrak itu telah ditamatkan. Berhubung dengan cara pembayaran, syarat Ng yang diterima oleh Ho menunjukkan bahawa bayaran berkala adalah perkara yang mesti untuk kontrak. Kesudahannya, mahkamah tidak menjumpai apa-apa alasan untuk mengganggu award timbangtara. Sejauh mana undang-undang adalah berkenaan, tiada apa-apa merit dalam rayuan (lihat ms 395G–I, 396B, F–H, 397C–F dan 398C, E–F).] G H I

A **Notes**

For cases on setting aside award of arbitrator, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 762–778.

B **Case referred to**

Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)

Legislation referred to

C Arbitration Act 1952 s 24(2)
Architects Act 1987
Architects (Amendment) Rules 1986

Appeal from: Originating Motion No R2–25–35 of 1995 (High
D Court, Kuala Lumpur)

Rajendra Navaratnam and *Lim Chong Fong* (*Azman, Davidson & Co*) for the appellant.

S Selvarajah (*Fernandez & Co*) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): This is an
E appeal against the order of the High Court judge dismissing the appellant's application to set aside an arbitration award. Our reasons for dismissing the appeal now follow.

The application was brought under s 24(2) of the Arbitration Act 1952 which reads:

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> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

In the present case, the alleged misconduct in question consisted of
G allegations that the arbitrator had committed errors of law and fact in the manner in which he proceeded to decide the issues raised before him.

The court's approach in cases like this is well established. Volume 2 of *Halsbury's Laws of England* (4th Ed) para 623 reads:

> *Error of law on face of award.* An arbitrator's award may be set aside for error
H of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the
I face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

Russell on The Law of Arbitration (20th Ed, 1982) at p 410 reads:

> The arbitrator has in general a discretion as to the manner in which the reference is to be conducted. See ante, pp 253–259, 279. The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party. *Mediterranean,etc Co Ltd v Fortress Fabrics Ltd* [1958] 2 All ER 186. Thus Cockburn CJ said: 'I would observe that we must not be over-ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding': *Re Hopper* (1867) LR 2 QB 367.

This passage was adopted and applied by Zakaria Yatim J in *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 at p 55.

The respondent ('Ng') is an architect practising under the style of Konsultant Senicipta. Ng was engaged to provide architectural services for the renovation of a factory at Balakong belonging to a subsidiary of the appellant ('Ho'). Differences having arisen between them, Ho and Ng got the Lembaga of the Pertubuhan Akitek Malaysia ('PAM') to appoint Cheang Kok Cheow ('the arbitrator'). Cheang was not only a chartered architect but also a fellow of the Chartered Institute of Arbitrators United Kingdom. He was also chairman of the PAM Arbitration Panel from 1978–1985.

Both Ng and Ho were represented by counsel before the arbitrator. Pleadings and agreed bundles of documents were filed and there was an oral hearing for several days. Encik CF Lim also appeared as Ho's counsel before the Arbitrator. Lengthy written submissions were also filed.

On 23 February 1995, the arbitrator delivered a nine-page award (second appeal record pp 516–526). In the light of the criticisms made by the appellant's counsel, we have read this award with great care. We are unable to see anything radically wrong with it.

Encik CF Lim also appeared in the High Court. He was unable to persuade Azmel J that there was anything wrong with the award.

Before us, En Navaratnam appeared for the appellant. This is not the kind of case which calls for a long and learned analysis of everything that was urged for the appellant because we saw hardly any merit in his arguments.

Out of deference to him however we will briefly state why.

Encik Navaratnam's first submission was that the arbitrator had misconducted himself because he had failed to deal with all the issues raised by Ho. A cursory look at the issues raised in the pleadings and the matters decided in the award will show this not to be the case. Encik Navaratnam was not aware that in the court below En CF Lim conceded that all issues raised in the pleadings had been considered by the arbitrator. There is no error on the face of the record here.

Encik Navaratnam's next submission was that Ng had unilaterally and unlawfully terminated the contract by giving notice, which he says Ng was not at liberty to do. He complains that the arbitrator imported his own knowledge into the case by holding that it was the custom and practice to give 60 days notice or such lesser period as may be agreed between the parties. The relevant portion of the records reads (appeal record at p 523):

A A contract between an architect and his client as is the custom and practice under the *conditions of engagement* sanctioned by the Malaysian Institute of Architects and the Board of Architects provides for termination by either party by the giving of a notice of 60 days or any shorter period that may be agreed to between the parties. (Emphasis added.)

B There is no merit in this submission. Ng's offer letter dated 30 October 1990, inter alia, stated (appeal record p 147):

> We shall be governed by the Articles of Association, Regulations & Bye-laws and Code of Professional Conduct of Pertubuhan Akitek Malaysia (PAM).

C The Architects (Amendment) Rules 1986 (PU (A) 347) dated 6 August 1986 was in force at all material times. These rules are made under the Architects Act 1987. The Fourth Schedule of the amended principal rules reads:

> Termination of engagement
>
> 16 The agreement between the Architect and the client may be terminated
D at any time by either party giving to the other party (60) sixty days' notice or such shorter period of notice as may be agreed upon by the Architect and the client.

The issue was raised before the arbitrator and En CF Lim's response in his final written submission was (appeal record p 459):

E 1.18 Further, there is no room for the importation and incorporation of the PAM Standard Conditions of Engagement of an Architect because there was never any expressed reference to the same in any document.

He was clearly wrong.

F Ng's letter of termination is dated 27 December 1993. Ho's Solicitors replied on the 7 January 1994 stating, 'our client accepts the repudiation'. The contract was at an end.

The next objection turns on the question of periodical payments. Ho's counsel submitted that this was a lump sum contract. The arbitrator said (appeal record p 522):

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> Unless a contrary intention is expressed it is the custom and practice in the architectural profession that an architect's fee whether on the basis of a percentage of the cost of the works or on a lump sum basis, the architect would be paid periodically relative to the progress made in providing the services.

H Again Ho's counsel complained that the arbitrator imported his own knowledge into the case. But, with respect, Ng's terms which Ho accepted were, inter alia (appeal record p 148):

> C Mode of Payment
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> I Payment to us shall be at intervals corresponding to each stage of work completed. Modes of payment at the various stages are as follow:
>
> Upon completion of Stage A: 25% of fee payable
>
> Upon completion of Stage B: 25% of fee payable

Upon completion of Stage C: 25% of fee payable

Upon completion of Stage D: 25% of fee payable

(*This shall be paid in equal monthly payments over the construction period. The final payment shall be adjusted according to final construction cost).

Note: Fees and charges when due shall not be reduced or withheld on event of penalties, liquidated & ascertained damages or sum withheld from payment to contractor.

Periodical payments were part and parcel of this contract.

So far as this appeal goes, we could find no grounds whatsoever for interfering. In passing, we would add that it is our observation that much of the troubles in this case arose because Ho was a poor paymaster. The fourth interim certificate was issued by Ng on 22 February 1993. It was for RM174,321.37. Ho would not pay the building contractor and the building contractor refused to do any more work. The total value of the contract as on that date was RM1,086,912.25. The balance due to Ng for fees was a paltry sum of RM15,075. Ho would not pay that. On 23 April 1993, Ng resorted to solicitors to send a letter of demand. Ho still would not pay. But Ho wanted Ng to do more work. On 2 June 1993, Ho demanded that Ng should submit amended plans to the Local Authority. By letter dated 8 June 1993, Ng asked Ho to settle the outstanding fees first. He did not. By December 1993, as earlier stated, the parties disengaged. It was Ng who initiated the arbitration to recover his fees.

So far as the law is concerned, we did not see any merit in this appeal. As for Ho's complaints before the High Court or before us, we would add that it is very difficult to feel any sympathy for the plight in which Ho now finds itself. The legal costs in proportion to what Ng claimed must now be enormous.

In dismissing this appeal with costs, we had also ordered that the deposit be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar